CONSIDERATIONS

On the LEGALITY of

GENERAL WARRANTS,

AND

The Propriety of a Parliamentary Regulation of the ſame.

To which is added,

A POSTSCRIPT on a late Pamphlet concerning Juries, Libels, &c.

THE THIRD EDITION.

With ADDITIONS.

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CONSIDERATIONS

On the LEGALITY of

General Warrants, &c.

THE Propriety of a Parliamentary Regulation of the Exerciſe of General Warrants, either by a Declaration of the Law as it now ſtands, or the Enaction of a new Law, is one of the moſt important Queſtions that the preſent Times have afforded. It becomes the more intereſting, from the Arrival of that Time, when we have been made to expect a Renewal of the Queſtion in Parliament.

The Public has already been entertained with ſeveral ingenious and elegant Treatiſes on this Subject: But as theſe Sheets are ſolely intended to convey the Sentiments of an Individual, abſtracted as much as poſſible from every Conſideration of Perſons or Party, he means not to attempt a regular Reply to any of thoſe Performances, unleſs ſo far as the Matters contained in them may occur in the Courſe of his Obſervations. To thoſe he will give the beſt Conſideration that plain Facts and unadorned Reaſoning can afford, when oppoſed to lively Thought and

elegant Expreſſion. If any late Production ſhould contain other Matters, unconnected with the Subject of this Paper, however popular, however miſrepreſented in Fact or Argument they may be, he will not deviate from his Plan in the Purſuit of them: he will leave to the Writer, whoever he is, all the Glory of miſleading the Ignorant, and inflaming the Factious, and will reſt aſſured that the Deception will extend only to ſuch. Above all, he will avoid the Agitation of private Character. As he writes not for the Purpoſes of Faction, or the Huzzas of a Mob, the Public muſt not expect that he will, at the Expence of *Humanity*, *Honour*, and *Truth*, endeavour to ſet off his Work with Ornaments of that Sort. Even though a late Writer ſhould, in the moſt groundleſs and indecent Manner, have made the Vilification of a great and reſpectable Perſon the chief Purpoſe of a long and laboured Production, he will check the honeſt Indignation which ſuch Calumny, unparalleled for its Falſehood and Effrontery, muſt raiſe in the Mind of every feeling Perſon. He will not deſert the grand national Object of his preſent Attention, even to purſue the pleaſing Path of the Vindication of an injured Character. He leaves it to the Juſtice and Humanity of every Individual to inquire into the *real Truth* * of any of the Inſinuations

* To afford a general Idea to the Public of the Degree of Credit due to that *decent* and *candid* Writer, I would obſerve on one or two of the Facts there hinted at; and becauſe the Alteration of a late Record, and the Diſcharge of a Juror, may ſeem the moſt important, and, if illegally done, the moſt dangerous of any of them; I ſelect theſe for the preſent Purpoſe. As to the firſt, It is the undoubted Right and frequent Practice of the Judge

tions thrown out in the Courſe of that Work againſt the Character alluded to; and hopes, that, until

Judge who is to try a Cauſe, when any Word in the Record appears to him improper, to ſummon the Attornies on both Sides, and direct an Amendment. If the Alteration is *immaterial*, i. e. if the Defect is ſuch as could not have availed the Party in Arreſt of Judgment, no Injury is done, and uſeleſs Objections prevented. If *material*, the Parties are at Liberty either to apply to the Court before Trial, or to move in Arreſt of Judgment after it. The Alteration in the Cauſe alluded to, was made in Conſequence of an Application to the Judge by the Attorney for the Proſecution, deſiring that the Defendant's Attorney might be ſummoned to attend, in order to amend the Record. The Summons was granted, *of Courſe*; the Amendment deſired was to inſert the Word *Tenor* inſtead of *Purport*. The Judge was of Opinion that the Defect could be of no Conſequence at all; but as the Amendment was deſired by one Party, and no Objection made by the Attorney for the Defendant, except declaring that he could not conſent to any Alteration, and as the Word *Tenor* is certainly, in an Indictment for a Libel, the more proper and technical Word, he directed the Amendment to be made. Such was the Alteration; I hope for the Honour of the Law, I may venture to affirm, that if it had not been made, yet no Advantage of any Defect in the Word *Purport* could have availed in Arreſt of Judgment.

As to the Diſcharge of a Juror Lord *Hale* ſays, Pl. C. p. ii. 296, "That the Juſtices at common Law "may remove a Juror for good Cauſe after he is ſworn;" and *à fortiori* therefore before he is ſworn one of the Jury.

The Father of Candour ſays, a Reſiſtance to former Directions was the only Cauſe in the Caſe alluded to. What the real Reaſon was I have never enquired; but ſuppoſing it ſo as repreſented by that Author, if the Directions of the Judge are of any Authority at all, an indecent

until he can make ſuch ſatisfactory Inquiry, every one will ſuſpend at leaſt the Credit which he might otherwiſe give to bold Aſſertion and deceitful Argument, and receive every ſecret Accuſation it may contain with that Diſtruſt, which is due to the moſt envenomed Rancour and Malevolence that can exiſt in the human Heart. Far leſs will the Author of theſe Obſervations ſuffer his own Pen to become the foul Channel of conveying to the public Senſe, the Filth of every falſe Charge or malicious Inſinuation, that can ſerve to aſperſe the Character of any Individual, of what Party ſoever he may be.

In conſidering the Propriety of a Parliamentary Regulation of the Exerciſe of General Warrants, two Objects of Inquiry chiefly demand our Attention: 1ſt, Whether in any, and in what Caſes, ſuch Warrants are at preſent agreeable or contrary to Law; for according to that any Declaration of the Law by Parliament muſt be directed? and how far the Liberty of the Subject demands further Security in that Reſpect by a new Law, in caſe the preſent Law ſhould appear defective? 2dly, What is the proper Mode of a parliamentary Declaration of the Law, in the Event that ſuch Declaration ſhould appear ſufficient, without any new Law?

With regard to the firſt of theſe Queſtions, the Legality of the Warrant is objected to on two Grounds. 1ſt, on account of the general Deſcription of the Offenders; and, 2dly, As containing an Order for the general Seizure of Papers. Theſe Objections

decent Contempt of them by any Juror is ſurely a very ſufficient Cauſe why that Perſon ſhould not be again impanelled.

Objections require ſeparate Conſiderations. In all the Arguments that have been uſed againſt General Warrants, the Illegality of a general Deſcription of the Offender has been aſſumed as an Axiom on one Side, and rather too eaſily admitted by the other. It is taken as a ſelf-evident Propoſition, that theſe Warrants are illegal in every Caſe, unleſs where the Safety of the State is concerned. No one has yet dared directly to doubt of that Truth. Will it not then be deemed arrogant indeed, if I preſume to entertain a Doubt of a Doctrine ſo univerſally received, and to diſſent in Opinion both from the Propoſition itſelf, and the Exception added to it?

All the Labours of the *Letter upon Warrants*, &c. have not produced a ſingle legal Authority in Support of the Illegality of thoſe Warrants; (I muſt be forgiven if I cannot conſider the *Obiter Dictum* of a Judge at *Niſi Prius* as an Authority in a Point of this Nature). I am at Liberty therefore to preſume that no Authority whatſoever can be found for this Purpoſe.

In Point of Argument and Reaſon, the only Objection is the Danger to which that Form of Warrant ſubjects every innocent Perſon. "It leaves "it (it is ſaid) in the Power, and at the Diſ-"cretion of every Officer, to ſeize any one he "thinks proper; and the Innocent are no leſs "expoſed to be arreſted under that Warrant "than the Guilty." Such is the general Objection: how is it founded in the real Nature and Extent of the Warrant?

The Warrant contains a ſpecific Deſcription of a particular Perſon; that too, which of all others

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is *ſolely* and *peculiarly* applicable to him, the Commiſſion of the Offence. How can a Warrant to arreſt the Author or Printer of a certain Paper, extend to any one who is not the Author or Printer? Is it not a *ſpecific* and *excluſive* Deſcription of that Perſon alone? If the Meſſenger, or other Officer, arreſts an innocent Perſon under ſuch a Warrant, he acts no more under the Authority of the Warrant, than if, under a Warrant to arreſt *John Wilkes*, Eſq; he had taken up any one of a different Name. If an Officer is diſpoſed wantonly to trangreſs his Warrant, he may do ſo, where it is the moſt ſpecial that can poſſibly be penned, or even without any Warrant at all. The Queſtion, therefore, is not whether a general Warrant is not liable to be abuſed by the Officer? but, whether it gives him Authority to do ſo, or confines the Execution of it to the Offender alone? Where then is this *inherent*, this *neceſſary*, this *innate* Danger to the public Liberty in the Form of thoſe Warrants?

The ſlighteſt Conſideration will point out to us Variety of Caſes, in which ſpecial Warrants cannot poſſibly be uſed; many others may occur which human Wiſdom cannot foreſee. Is then the Guilty to eſcape, becauſe no nominal Deſcription can be given of him? or is it lawful, in ſuch Caſe, to grant a Warrant deſcribing him by other Marks peculiar to him alone? Suppoſe a Murder is committed by a Perſon, whoſe Name is unknown in that Part of the Kingdom: what is to be done? Is the Murderer to be left to eſcape, becauſe a nominal Warrant cannot be iſſued againſt him? Would the Law, in ſuch Caſe, hold a general Warrant to arreſt the Perſon guilty of the Murder, to be illegal, and a Violation

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of the Liberty of the Subject? Surely not. The Caſe of Murder is put only as an Example: The Reaſon, indeed, may perhaps be ſtronger there than in any other Offence, except ſuch as reſpect the Peace or Commerce of the State; but the Principle extends equally to every other Crime. We know of an Occaſion not very remote, where the moſt dangerous Conſpiracy againſt the Trade of the Nation was attempted, by ſeducing away a Number of our beſt Manufacturers, and carried on in ſo ſecret a Way, and at a Diſtance from *London*, that the Secretary of State was obliged to iſſue a general Warrant againſt all the guilty Perſons. This was not a Caſe of Treaſon, and if the Magiſtrate had been tied down to a nominal Warrant, the Conſpiracy muſt have had its full and pernicious Effect. Many other ſuch Caſes, where nominal Warrants cannot poſſibly have Effect, muſt occur to the Imagination of every one. How dangerous then would any Law be which ſhould tie up the Hands of the Magiſtrates, and confine their Authority to that ſpecial Form?

To theſe Arguments, drawn from the Nature of the Warrant itſelf, and the Variety of Caſes in which it may be neceſſary, I muſt inſiſt on the tacit Approbation of thoſe Warrants, by the Court of *King's Bench*, on all the Occaſions, when they have come by *Habeas Corpus* before the Court. It is ſaid, indeed, that the Silence of the Court proves nothing, becauſe that the Judges do not uſually give Attention to the Form of the Warrant, unleſs where a Diſcharge is prayed on Account of any Irregularity therein. Yet, in the Opinion of an honourable and learned Member, who, in ſpite of Detraction, will be

ever revered, as excellent in private Character, eminent in Parliament, eminent in the Knowledge, and very high in the Practice of the Law, ſuch Acquieſcence, if not warranted by the Opinion of the Court that the warrant was legal, implied a Breach of Duty, and conſequently a Breach of Oath. It is ſaid that the Court is not to ſearch for Irregularities and Defects, but only to judge of thoſe complained of to them. This Doctrine I can by no Means admit to be true. The Practice otherwiſe is frequent. Queſtions of Law are frequently determined in favour of one or other of the Parties upon Reaſons never thought of at the Bar. Objections to Pleadings (of all others the moſt undeſerving of the ſpontaneous Interpoſition of the Judges) are often taken and determined by the Court, tho' neglected by the Counſel. Whoever will look into the Reports, or attend the Courts of Law, will find the Truth of this Aſſertion. But whether it be ſo or not in other Matters, in the Caſe of Priſoners brought before the Court by *Habeas Corpus* and who, by *Order* of the Court, are to be diſcharged, or detained in Impriſonment, either in the Cuſtody of a public Goaler, or of the Bail (for Bail being a Reſtraint of Liberty, is conſidered in Law as an Impriſonment, and the Perſon to be in the Cuſtody of his Bail) I ſhould clearly think, that the Court is bound to attend to every Circumſtance of the Commitment, and, if the Perſon is illegally impriſoned, to diſcharge him. If the Commitment is illegal, what Right has the Court to take Bail? The Law ſays he is a Free Man; can the Court then legally detain him under any Reſtraint? If a Priſoner was to be brought before the Court by *Habeas Corpus*, committed by a Perſon who was no Magiſtrate, or

without

without any Offence ſpecified in the Warrant, and on ſuch Commitment was, from his own Ignorance, or that of his Counſel, to offer Bail, would it be excuſable in the Court to take Advantage of that Ignorance, and detain him under an Impriſonment which the Law declares is abſolutely illegal? If then it is the Duty of the Court to diſcharge every Priſoner brought before them under an illegal Commitment, is not every inſtance where they have done otherwiſe in the Caſe of general Warrants, an Authority in Favour of the Legality of that Form of Warrant? This at leaſt muſt be allowed, even if the Inattention of the Court, in point of Fact, was to be admitted, that the Illegality of the Warrant is not of ſo groſs a Nature as it is repreſented to be; for no one, I believe, will go ſo far as to ſay that the Court can legally detain in Cuſtody, a Perſon committed by a Warrant, the Illegality of which is ſo glaring, as muſt ſtrike every one at the firſt *Bluſh*. But whatever Inference may be drawn from the Silence of the Court, it is impoſſible to deny that which ariſes from the Acquieſcence of the Counſel in the Legality of ſuch Warrant, in every Caſe where they have prayed Admiſſion to Bail, inſtead of a Diſcharge; and in the Multitude of ſuch Commitments that have been brought before the Court, not a ſingle Inſtance is to be found where a Diſcharge was prayed on Account of that Objection to the Validity of the Warrant.

If then there is no legal Authority againſt the Validity of ſuch Warrants; if the Danger to the Subject is a mere Phantom of Imagination; if general Warrants are neceſſary in many Caſes, even of Miſdemeanor; if the Silence of the Court

of *King's-Bench*, and the Acquieſcence of Counſel, is an Admiſſion of their Opinion, may I not on thoſe Grounds preſume to defend the Legality of the Warrant in queſtion?

Thoſe who ſo warmly maintain the contrary Doctrine, admit the Exception of Caſes of Treaſon; but if their Principle is juſt, it extends to Treaſon as much as any other Caſe, and the Exception is abſurd. Are not the Innocent expoſed to the ſame Danger from the Generality of the Warrant in Caſes of Treaſon, as where the Offence is only a Miſdemeanor? Can the public Safety ever require a general Warrant, where a ſpecial Warrant can be uſed? The Diſtinction, therefore, if there was any, could not be between Caſes of Treaſon and other Offences, but between thoſe where ſpecial Warrants can, and where they cannot be effectual to lay hold on the guilty Perſon.

After all that has been ſaid, I will admit that I by no means approve of general Warrants where ſpecial can be of Effect; becauſe the Want of a nominal Deſcription may undoubtedly be ſometimes the accidental Means of bringing innocent Perſons into Trouble, without any bad Intention either of the Magiſtrate or Officer. I allow therefore the Preference of nominal Warrants in point of Expediency; tho' general Rules of Law cannot ſo yield to particular Circumſtances as to depend on the mere Poſſibility of an Inconvenience; the Inconvenience too of the moſt trifling Nature, becauſe if executed on the guilty Perſon no Injury is done; if on any other, it is without the Sanction of the Warrant, the offending Officer is amenable to the Law, and a Jury of his

Country

Country will give due Satisfaction to the Party injured.

It has been aſſerted, that *general Warrants* have been *frequently condemned by former Parliaments.* The Writer ſhould have ſupported his Aſſertion by Examples. The Reſolution in *Scroggs*'s Caſe, the only one cited to this Purpoſe, is not at all applicable to the general Warrant now in queſtion. In that of *Scroggs*, not only the Perſons were not ſpecified, but even the *Offence left in general.* It gave Authority to arreſt the Authors, *&c.* of all ſeditious Libels, *&c. which ſhould thereafter be publiſhed.* So that it not only left it to the Officers to judge what Papers were libellous, what not, but extended to Offences not yet committed. I need not obſerve on the manifeſt Difference between that Warrant and the preſent; yet the Public has been made to believe it a Caſe directly in condemnation of that iſſued by Lord *Halifax.*

From the above Premiſſes, theſe Concluſions neceſſarily follow, 1ſt, *That general Warrants for the Seizure of Offenders are not contrary to Law*; and therefore if the Parliament is to make any Declaration of the Law in this reſpect, it muſt be in favour of the Warrants. 2dly, That there is nothing dangerous to the Subject in that general Form of Warrant; that in many Caſes ſuch Warrants are neceſſary; that it is impoſſible for all the Wiſdom of human Legiſlation to foreſee in what Caſes they may be neceſſary, in what not, as it does not depend on the Degree of the Offence, but the Circumſtances of particular Caſes; *that a Law therefore to regulate and reſtrain the future Exerciſe of ſuch Warrants, might be productive of the moſt inconvenient and fatal Conſequences.*

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With regard to the general Seizure of Papers, my Notions of the Law are very different from thoſe I have ſubmitted on the firſt Objection; for as I cannot form to my Imagination any legal or political Reaſon that can require the Exerciſe of that Power on any Occaſion whatſoever, I muſt think it illegal in every Caſe, even that of High Treaſon, or other public Danger. The Seizure of all Papers relating to a Fact already committed, or to be afterwards carried into Execution, may often be neceſſary to detect the Guilt of the one, or prevent the Perpetration of the other. But the general and undiſtinguiſhing Seizure of all Papers whatſoever, whether of a public or private Nature, whether connected with the Object of Inquiry or not, can never be neceſſary, and of courſe can never be lawful. The Practice of ſuch Warrants for the general Seizure of Papers, ſeems to have ariſen in the Hurry and Inattention of Office. The firſt of that Sort is ſaid to have been iſſued by Lord *Townſhend*; a Miniſter of whoſe Attachment to the Laws, Liberty, and Conſtitution of his Country, no Doubt was ever entertained, and which the Defender of the Minority I am perſuaded would not be the Perſon to ſuggeſt. Since that Time it has been the uniform Practice of the Office in every Warrant to inſert an Order for the general Seizure of Papers. If the Principle I have adopted is true, it extends equally to all Caſes; and therefore every Inſtance where ſuch Warrant has been uſed, the Illegality and the Breach of the public Security is the ſame. If the Liberty of the Subject has been thereby violated in one Caſe, it has been ſo in all. If one Caſe deſerves Condemnation, it is requiſite in all.

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The Author of the *Letter upon Warrants, &c.* has in this, however, as well as every other Subject of his Work, adopted a moſt groundleſs Principle; all the Arguments and Concluſions founded on which muſt fall with the Principle itſelf. No Man, ſays he, *is to furniſh Evidence againſt himſelf*; therefore the Seizure even of Papers relating to a Crime committed by him is unwarranted by Law. A general Rule of Evidence is here aſſumed. Let us ſee what is meant. Does it mean that no Man is to be compelled to give Teſtimony out of his own Mouth againſt himſelf, to produce Papers or Goods, or in ſhort to do any Act for his own Conviction? If ſo, I admit the Propoſition. The Law, out of Tenderneſs to the Party accuſed, has adopted the Maxim. It will not reduce any one into a Situation the moſt trying to Humanity, where he lies expoſed, if guilty, to all the Temptation of Perjury, or muſt be the Inſtrument of proving his own Guilt, and where, even if innocent, his Evidence would be received with the higheſt Diffidence.

But becauſe the Law, from Motives of Compaſſion, will not oblige the Party charged to produce any thing againſt himſelf, does it follow that every thing in his Poſſeſſion is ſacred, and that nothing found in his Cuſtody is to be uſed in Evidence by his Accuſer? Does not the daily Practice prove the Falſity of that Idea? Are not Perſons arreſted on Suſpicion of Felony conſtantly ſearched? Are not the Papers or Goods found upon him produced in Evidence againſt him? Is his Houſe more ſacred than his Perſon? Is his Cloſet protected, when his very Pockets may be rifled? Is not the Practice and the Right of ſearching Houſes for ſtolen Goods univerſally admitted?

mitted? Are not the very Letters, nay the Confeſſions of the Accuſed, uſed in Evidence of his Guilt? Where then is the Rule of Law, where the Principle, that no Man is to furniſh Evidence againſt himſelf? He is not to be compelled to do it by his own Act; but the Proſecutor is at Liberty to avail himſelf of whatever he can find in the Houſe, on the Perſon, under the Hand, or even from the Mouth of the Accuſed, to prove the Truth of his Charge. Where then is the Indecency of the Avowal of the Secretaries of State in their Letter to Mr. *Wilkes*, that they ſhould keep ſuch Papers as tended to a Proof of his Guilt? The Law authoriſed them to ſeize all ſuch, and to produce them in Evidence at the Trial. If they were not legal Evidence, why did not Mr. *Wilkes*'s Counſel object to the Reading of them? They were not Men to overlook or neglect any Objection that had the leaſt Foundation in Law.

The Caſe of *Algernon Sidney* has been cited as a glaring Example of the Iniquity of making Uſe of Papers, ſeized in one's Houſe, in Evidence againſt him. I refer the impartial Inquirer to the Caſe itſelf. He will there, indeed, ſee a Scene of Iniquity and Oppreſſion of the blackeſt Dye; but he will find the Injuſtice not to have conſiſted in the Uſe of Evidence found in the Houſe of the Accuſed, but that thoſe Papers, produced in Evidence, really contained no treaſonable Matter, though they were conſtrued an Overt Act of Treaſon, and, as ſuch, to ſupply the Place of another Witneſs. The Compariſon of a Caſe we wiſh to magnify to others of a moſt groſs and atrocious Nature, may ſerve to impoſe on thoſe who are diſpoſed to take all on the Credit of the Writer; but, to the thinking and

and inquiring Man, if they are not really appoſite, they ſerve but to point out the Weakneſs of that Cauſe which is obliged to have Recourſe to ſuch mean and unworthy Arts.

The Protection then which the Law gives to the Papers of every Individual, does not apply to thoſe which relate to any Crime he has committed. The Conviction of the Guilty requires that ſuch ſhould be liable to be ſeized; he has, by his own Act, expoſed them to Seizure. But, if the Commiſſion of a paſt Offence can authorize the Seizure of all Papers relating to it, much more does the Prevention of any Conſpiracy or Purpoſe againſt the Safety or Commerce of the State, demand that the Peace Magiſtrates ſhould be armed with an Authority of the ſame Extent.

From theſe Obſervations it appears, 1ſt, That a general Warrant for the Seizure of Papers muſt be in every Caſe unlawful; 2dly, That the Law permits the Seizure of ſuch Papers as bear Relation either to a paſt Crime, or any future Danger to the State. If then ſuch is the Law, ſuch muſt any parliamentary Declaration of it be. If, however, the Law is thought to be otherwiſe, or, as ſuch, to be defective, and therefore a new Law to be neceſſary, it will become the ſerious Conſideration of Parliament, how far it will conduce to the Peace, or conſiſt with the Safety of the State, if they take out of the Hands of the Magiſtrate the moſt effectual Means of bringing ſuch Crimes or Conſpiracies to Light; they will at the ſame Time give no further Power in a Matter ſo liable to abuſe than the public Welfare requires; they will tie up the Hands of any Magiſtrate from ſeizing any Papers but thoſe which bear relation to the Crime or Conſpiracy which

it is his Duty to detect; and they will make him ſeverely anſwerable for the Stretch of a Power which nothing but the public Peace can give Sanction to, and the Abuſe of which is ſo alarming to that of every Individual.

I flatter myſelf, however, that the Law has already afforded us as much Security as Law can give; that the Papers of every innocent Man (nay even of the Guilty, as far as Guilt is not concerned) are under its Protection; and that if any Tranſgreſſion is committed upon them, a full and adequate Redreſs is to be had, either by Action or Indictment.

If then every general Warrant for the Seizure of Papers *is* illegal, I muſt neceſſarily admit, that the Warrant iſſued againſt Mr. *Wilkes* was in that Reſpect illegal, as well as every other that has been granted for ſo many Years paſt, and by ſuch Variety of Miniſters, even the moſt popular. But while I condemn the Practice of Office, I entirely exculpate the Miniſters, whether *living* or *dead*, in *Office* or *in Oppoſition*, who have been the innocent Means of iſſuing ſuch Warrants, as, in the Multitude of thoſe Warrants, no Caſe appears where the Miniſter has acted with any malevolent Views.

The Defenders of the Minority are candid enough to acquit the Secretaries of State of any evil Intention; they *honour the Living, and revere the Dead*; they *admit the Uſage of Office in Excuſe of the Warrant*; they *acquit the Perſon while they condemn the Practice*; nay, if any Exceſſes happened in the Execution, they attribute it to Motives of the moſt laudable Nature, to a warm Attachment towards the moſt juſt, beneficent and amiable

amiable of Sovereigns, and an honeſt Indignation againſt the moſt injurious and groſs inſult that was ever offered to the Majeſty of a King.

Should theſe Gentlemen, ſatisfied with Candour in Profeſſions, attempt, under the Maſk of Tenderneſs, to affix on any Individual the moſt ſevere Reproach of which the Character of a Miniſter is capable, and by obtaining a parliamentary Condemnation of a particular Warrant, hold him forth to the public Alarms as the Violator of the Rights of the Subject, and the Enemy of his Country, I truſt that Parliament will not ſuffer its Juſtice, Honour, and Dignity, to be perverted to ſo unworthy a Purpoſe.

If they are to condemn Miniſters, let them do it *openly, and with ſpirit*; let them call upon *every one* who has thus dared to trample on the Liberty of his Country: Let neither *Rank* nor *Popularity* protect any one of the *Guilty*.

If they are to condemn a Form of Warrant illegal in every Caſe, *let the Remedy have the ſame Extent as the Evil*, let not a parliamentary Declaration, or the Enaction of a new Law, cramp a general Rule within the narrow Limits of a particular Caſe; a Reſtraint which could not but infer a tacit Approbation of the Warrant in every other that has, or may hereafter occur.

Having thus endeavoured to point out, to the beſt of my Power, how the Law at preſent ſeems to ſtand with Reſpect to general Warrants for the Seizure of Perſons or Papers and of Courſe what ſhould be the Purport of any parliamentary Declaration; alſo how far the public Weal requires

that Form of Warrant to be allowed or prohibited by any new Law that may be thought neceſſary: I now proceed to the Conſideration of the ſecond Queſtion, viz. what ſhould be the Mode of a parliamentary Declaration, viz. whether by Bill or Reſolution?

This Queſtion was the only Subject of Debate when Sir *W. M.*'s Motion was in Agitation before the Houſe. I flatter myſelf if the Motion is renewed for a parliamentary Declaration of the Law of general Warrants, it will be drawn up in a Form agreeable to the Uſage of Parliament; and that the real Merits of the Queſtion will be the only Object of Attention; but as the Motion may perhaps extend now, as before, to a bare Reſolution, I hope the following Conſiderations on that Subject, as moved, amended, and thrown out in the laſt Seſſion, and as arraigned and defended by Writers on both Sides ſince the Receſs, will not be unacceptable.

The Right and Propriety of parliamentary Declarations of the Law by Bill is an eſſential Part of the legiſlative Authority, and warranted by many Examples from the earlieſt Times. How far either Houſe of Parliament, not acting in a legiſlative or judicial Capacity, can with Propriety make any Declaration of the Law by Reſolution, is a Queſtion of a more doubtful Nature.

I ſubmit the following Reaſons to the Public, in ſupport of the Opinion of thoſe who, diſſenting from the Propriety of a Reſolution, gave their Negative to the Motion.

1ſt, A Reſolution being only the Vote and Opinion of one Houſe of Parliament, is not an Act of the Legiſlature, and therefore cannot be taken Notice of in any Court of Law, as the Judges are ſworn to judge ſolely by the Law. Such a Reſolution then declaratory of a Point of Law, would be liable to be contradicted not only by the Reſolution of the other Houſe of Parliament, but alſo by the Determinations of the Courts of Law.

2dly, If the judicial Power is of all the Parts of Government the moſt *nice in its Nature*, the moſt *delicate*, *and*, *if miſapplied*, the moſt *dangerous in its Conſequences*; if the Peace and Safety of the Subject in Life, Liberty and Property depends immediately on the Preciſion, Certainty, Exactitude and Uniformity of judicial Determinations; if popular and mixed Aſſemblies are, in their Nature, *incapable* of that deliberate Attention, that patient Hearing, that calm and diſpaſſionate Conſideration, that clear and accurate Deciſion which ought ever to be found where the judicial Authority is lodged; if theſe are much more requiſite for the Determination of general Points of Law, where there are no particular Circumſtances to guide the Judgment, and where the Conſequences of a wrong Determination are ſo much more fatal than in a particular Caſe; if even the moſt ordinary Points are never determined by the Sages of the Law, without full Argument at the Bar, and mature Conſideration on the Bench, can a numerous Aſſembly, conſiſting of Men of various Ranks, Profeſſions, and Intereſt, be the proper Reſidence of legal Deciſion? *Il n'y a point de Liberté* (ſays the great Writer on the Spirit of Government and Laws)

ſi la

ſi la Puiſſance de juger n'eſt pas ſeparée de la Puiſſance Legiſlative.

It may be ſaid, perhaps, that this Objection, drawn from the Nature of a popular Aſſembly, would extend to the legiſlative, as well as the judicial Power; but the Anſwer is obvious: The Ballance and Independence of the different Parts of the Community require that every Part ſhould have a Share in the Legiſlation; but in the other there is no ſuch Neceſſity, as the Judges are liable to be called before Parliament, and made to Anſwer for any Defect of Duty: An Error too in Legiſlation is of much leſs Conſequence than in judicial Determinations; the former may be immediately remedied; but there is an End of the Certainty and Uniformity of the Law, if general Points of Law are liable to vary with the varying and inconſtant Opinions of Men.

3dly, We have, in former Times, ſeen Parliaments corrupt and venal; the ſame Calamity may await us in future Times. How dreadful would it be, if, in ſuch Times, the Law was to be at the Mercy of the Reſolutions of either Houſe? But if either Houſe has the Right in deciding on the Law by Reſolution, every ſuch Deciſion muſt be held as Law, ſince no Appeal lies from their Judgment. The Reſolutions, therefore, in Richard the Second's Time, muſt be held as Law, where the Houſes of Parliament reſolved, *That the King has the Right of appointing what Matters ſhall be firſt handled in Parliament, and after that what next, and ſo on to the End of the Seſſion; and that if any one ſhould act contrary to the King's Pleaſure, he ſhould be puniſhed as a Traitor. And, 2dly, That the Lords and Commons cannot, without Conſent*

ſent of the King, impeach any of his Judges or Officers; and that if any one ſhould do ſo, he ſhould be puniſhed as a Traitor. We have indeed too had Judges corrupt; but that Misfortune, great as it is, cannot be of great Conſequence, while they remain liable to Impeachment in Parliament.

4thly, A Reſolution is no more than a *mere Opinion* of the Houſe. When it applies to others, and is to receive Force and Effect with regard to them, it is always followed by ſome *directory Vote.* Thus, in the common Form of paſſing a Bill, after the Reſolution that the Bill do paſs, *Ordered*, That ſome Member carry the Bill to the Lords, and deſire their Concurrence; ſo too, all Directions to Committees are by *Order*; in ſhort, every *final*, or *executive Act* of the Houſe, if I may ſo expreſs myſelf, is by Order. A Reſolution is a mere Opinion, and as ſuch, when it extends to any, but the Houſe itſelf, is never final, but a leading Step to ſome other Act.

5thly, Becauſe there is not an Inſtance in all the Records, or Journals of Parliament, where the Houſe ever took upon itſelf to determine a general Point of Law by Reſolution, *unleſs when it immediately aroſe from, and in the Courſe of, or tended to, ſome other Act of Parliamentary Proceeding*; the Defence of the Minority, and the Reply to that of the Majority, have cited many Caſes; I have looked into them all, and am now bold to ſay, that neither taken ſeparately, nor together, do they at all prove the *Uſage*, far leſs the *Propriety* of ſuch extrajudicial Determinations. I ſhall conſider every one of the Caſes cited apart.

In the Caſe of the Charge againſt the Judges, in which, becauſe they are amenable to no other Juriſdiction, Parliament has more peculiarly a Right to interfere, we find the Reſolutions to be the Reſult of an Inquiry directed to the Houſe, and the intended Grounds of future Impeachment or Bill. In the Caſe of the Lord Chief Juſtice *Keeling*, "Reſolved, That the Practice and "Precedent of fining or impriſoning Jurors is "illegal." *(a) Ordered, That the Lord* St. John *have Leave to bring in a Bill, to declare the fining and impriſoning of Jurors illegal.*

The Caſe of Lord Chief Juſtice *Scroggs* was, in courſe of an Inquiry ordered into the Conduct of the Judges, in which it appeared, that he had iſſued general Warrants, impowering Officers to ſearch for, and arreſt, the Authors, *&c.* of ſeditious Libels. This being reported by the Committee to the Houſe, "Reſolved, That ſuch "Warrants are arbitrary and illegal." *Ordered, That the ſaid Sir* William Scroggs *be impeached on the ſaid Report.*

In the Caſe of Lord *Danby*, a Member of the Houſe wantonly arreſted *during the Seſſions of Parliament*, without even the Shadow of an Offence, "Reſolved, That the granting the Warrant "now produced againſt Lord Danby, a Member "of this Houſe, and the taking him into Cuſtody "by Virtue thereof, is a *Breach of the Privileges "of this Houſe.*" The Houſe taking Notice that the Warrant bore date on the *Thurſday* preceding, and that Lord *Nottingham*, in Anſwer to the Queſtions propoſed to him, ſaid that the Information againſt him was on the Friday, *Ordered, that*

(*a*) Journals, 13 *December* 1667.

the

the ſame Members do again attend Lord Nottingham, to know when he received the information. (b) Such is the *true* State of this Caſe. How is it repreſented in the Defence of the Minority? Reſolved (ſays that Pamphlet, p. 26.) *that the taking of Lord* Danby *by that Warrant was illegal.* No! Warm and indignant as the Houſe juſtly was, they did not proceed thus raſhly on the Spur of a particular Occaſion (as Lord *Bacon* expreſſes it) to determine a great and general Point of Law. *They confined their Reſolution to the Privileges of the Houſe*; and if I may form a Conjecture, on what Grounds they pronounced the Breach of Privilege, I ſhould think it manifeſt not to have been on Account of the Illegality of the Warrant; for as to the want of Information, which was the only poſſible Defect therein, we find the Houſe far from pronouncing the Warrant illegal on that Ground, ordered the *Fact* to be again inquired into; this too, certainly, with a View to further Proceedings in that Matter.

The Caſe of Lord *Marlborough* in the Houſe of Lords was alſo concluded, with a Motion to bring in a Bill for the Indemnification and future Direction of the Secretaries of State; the Bill paſſed the Lords, and was thrown out by the Commons. Such are the Caſes in the Defence of the Minority. Let us now turn to thoſe cited in the Reply.

The Reſolution with Regard to the Impreſt Money was *previous to a Petition to the King on the ſame Subject.* That of the 17th *March* 1724, was in Conſequence of a *Report from the Committee of Grievances*, the Purpoſe of which Inſti-

(b) Journals, 13 *December* 1667.

tution was not confined to a more important Reſolution, but extended to remedy the Evil by *Bill*, *Impeachment* or *Addreſs*. The Reſolution in the Caſe of Mr. *Prynne*, a Member of the Houſe, was in Conſequence of a Complaint made againſt him, and followed by the *Cenſures of the Houſe*, 15 *July* 1661. In the Caſe of Sir *John Winter*'s Grant, 2d of *May* 1663, the Committee *reported it not fit to be continued. (a)* This might reſpect the Expediency, rather than the Legality of the Grant. All the Proceedings with regard to Mr. *Tayleur*, were to ground an *Impeachment againſt Lord Mordaunt.*

The Declaration of the Illegality of the Charter to the Woodmongers, was in *conſequence of a Complaint* to the Houſe, and previous to a Direction to the Committee to inquire into the Crimes done under that Charter, and to *preſent them to the Houſe for Puniſhment.* The Reſolution in *Johnſon*'s Caſe was the Foundation of a *Bill to ſet aſide the Judgment*, &c. That of *March* 1707, was in Conſequence of a *Complaint to the Houſe againſt the Chief Juſtice of Caernarvon*, and would probably have been followed by an Impeachment, if the Houſe had not diſagreed from the Committee in thinking the Charge proved. Dec. 19th, 1710, Reſolved, "That the Charter attempted to be impoſed on the Corporation of *Bewdly* is void and illegal:" In Conſequence of this Reſolution, *an Addreſs was agreed on to the Queen to repeal the ſaid Charter.* I would here obſerve, that an Addreſs to the Queen to repeal a Charter *illegal and void* would have been a groſs Abſurdity; ſuch an Addreſs therefore plainly ſhows the

(a) The Reply ſays, the Committee preſented the *Illegality of the Grant.* See Journals.

Opinion

Opinion of the Houſe, that in ſpite of their Reſolution the Charter ſtill remained in ſuch a State of Validity as to require a Repeal.

The Writer upon Libels and Warrants has from Multitudes of Inſtances (ſays he) ſelected theſe few. The Caſe of Mr. *Hambden*, where the Commons reſolved that the Charge of Ship-Money, the Writs called Ship-Writs, and the Judgment againſt Mr. *Hambden*, are againſt the Laws of the Realm. This was previous *to a Bill for declaring void all the late Proceedings with regard to Ship-Money, and vacating the Judgment of the Exchequer againſt Mr.* Hambden.

The Reſolutions in the Caſe of Mr. *Prynne*, &c. that the Proceedings againſt them in the Star Chamber, &c. were illegal, were followed by a *Bill to reverſe the ſame.* So in the Caſe of Mr. *Lilburn*, after reſolving the Sentence againſt him to be illegal, &c. and that he ſhould have Reparation; Ordered, That the Committee prepare this Caſe, together with that of Dr. *Leighton* and Dr. *Baſtwick*, to *tranſmit to the Lords.* In the Caſe of *Topham*, 1689, Reſolved, That the Judgments, &c. are illegal, and that *a Bill be brought in to reverſe the ſame*; ordered, That Sir *Francis Pemberton*, &c. who were the Judges in that Caſe, be *taken into Cuſtody of the Serjeant at Arms. Norris* had given Information with regard to the Popiſh Plot: A Committee was appointed to enquire into the ſame; on the Report it appearing to the Houſe, that the ſaid *Norris* had been arreſted on his Return from *France* by an Order from Sir *Lionel Jenkins*, they reſolved the Commitment to be illegal, and *an Obſtruction to the Diſcovery of the Plot*; and the Houſe ordered thoſe who had gi-

ven the Information to Sir *Lionel* againſt *Norris into Cuſtody.*

Such is notable Courſe of Precedents to prove the Uſage of parliamentary Deciſions on Points of Law, tho' unconnected with any other Proceedings. I ſhould affront the Judgment of the Public, if I was to make any Obſervations upon them, or endeavour to point out how very unfairly many of them have been repreſented. I doubt not but many more of the ſame Sort might have been quoted; but as all the *Zeal* and *Aſſiduity* of theſe Authors has not produced a *ſingle Inſtance*, I muſt preſume, that not one can be found in all the Records of Parliament, of the Deciſion of a general Point of Law by Reſolution, unleſs it was in Conſequence of a Complaint made to, and to be puniſhed, or redreſſed, by them, or as the Foundation of an Addreſs, Impeachment, or Bill.

But if the Precedents had been as numerous and appoſite as they have been repreſented to be, they ought not to influence our Opinion, in Oppoſition to the Dictates of our Reaſon, and the ſound Principles of legal Policy.

It is a Maxim quoted by Lord *Coke*, "That "we are to be governed by Law, not Examples; "and that Precedents, which run in a Storm, "are not Directions in Point of Law." "Pre-"cedents of a wrong Thing," ſays Biſhop *Burnet*, "only prove, that the ſame Wrong has "been done before."

We may be told, perhaps, that the Motion in this Caſe was, with a View to introduce another reſpecting

reſpecting the Privilege of the Houſe. The Reply has informed us what that ſecond Motion would have been; but I think it goes too far, when it aſſerts, that the Houſe conſidered and reaſoned on that Queſtion, not as a diſtinct and independent, but as the Preliminary to another reſpecting the Privileges of the Houſe. Far from ſeeing the neceſſary Connection between thoſe two, I ſhould have thought it impoſſible that the Perſons, who ſo ſtrongly expreſſed their good Opinion of, and tender regard for, the Characters of the two noble Lords, could intend any Motion of the Sort. Could thoſe Gentlemen, who believed them to have acted, rather with *a laudable Warmth of Duty, and a well intended Adherence to the uniform Courſe of Office*, than from any malevolent Intentions, either againſt the Public or the unhappy Individual, be the Perſons to propoſe ſuch a Reſolution which would have ſecretly branded their Names with indelible Infamy? No, the Spirit and Honour of thoſe Gentlemen could not intend ſo ſevere a Stigma, where they profeſſed ſo much Tenderneſs. They were not capable of ſtabbing that Reputation in the Dark, whoſe Innocence they had ſo openly confeſſed. If, then, it appears impoſſible ſo to *ſtrain* that Motion, as to bring it within the Authority of the Precedents produced, as the Foundation of future Procedure; it is no leſs ſo with Regard to the Enquiry from which it is ſaid to have taken its Riſe. All the Inſtances, where, on Enquiries, the Houſe has come to Reſolutions on Points of Law, have been during the Courſe of the Enquiry, and as leading to that End which was to be the Conſequence of it; but at the Time when Sir *W. M*-----'s Motion was made, the Enquiry, during the Courſe of which the Warrant had

had been produced, was concluded, the Parties complained of were honourably acquitted, and nothing of that Warrant remained before the Houſe, more than of every other which had appeared during the Enquiry. Nay, the Gentlemen who made the Motion, ſtrenuouſly endeavoured to ſeparate it entirely from any particular Caſe which had then occurred, and thereby deprived it of the only Circumſtance which could give it the leaſt Colour of Regularity.

If, then, the Warrants which had appeared in Evidence, were of ſuch a Nature as to require the Notice of Parliament, the ſame Regard to the public Weal ſhould have brought forth every other liable to exception. Was this alone the guilty Warrant, and were thoſe by which it was miſled, undeſerving of Cenſure? Many of thoſe, and ſome of them of a much more dangerous Nature, had appeared to be of very late Date. The guilty Authors of them, if Guilt exiſted in the Caſe, were ſtill alive; *immo vero etiam in ſenatu.* Was this alone ſelected becauſe *authoriſed by the longeſt Courſe of Office*, becauſe *iſſued by a Miniſter of the moſt exalted Character*, becauſe *exerciſed only in the Caſe of the moſt daring Offender that any Country ever produced?*

If the Silence of Parliament would have been a tacit Approbation of this Warrant, becauſe it had appeared in the Courſe of an Enquiry *then paſt*, does not the ſame Silence bear the ſame Conſtruction in the Caſe of every other then produced? May it not be inſiſted in Defence of the future Exerciſe of every one of thoſe Warrants, as well as of that iſſued by Lord *Halifax*, "That "the Houſe of Commons thought them, in the

"very

" very laſt Winter, ſo neceſſary a Power in Ma-
" giſtracy, that they refuſed to condemn or abro-
" gate them? Does not their Acquieſcence prove,
" that they thought them neither illegal nor dan-
" gerous? and is not a Secretary of State *bound*
" to conſider them as authoriſed by Parliament,
" until annihilated judicially." This Reaſoning would *indeed* have been forcible, if Parliament had ſelected and paſſed a Cenſure on any one of thoſe Warrants, without taking any Notice of the reſt: Such a Diſtinction would, *of Neceſſity*, have inferred an Approbation of thoſe paſſed over in Silence, and the *more atrocious* the Nature of any ſuch Warrants, the more would ſuch Silence have been a Ratification of them. Thus, by a *jeu de politique*, the ſame Conduct of Adminiſtration would have drawn the Cenſure of Parliament on one Miniſter, and obtained its Approbation and Protection to another, and a Houſe of Commons, to Anſwer the low Ends of Faction, would have been made, like *Silenus* of old, to blow hot and cold with the ſame Breath.

Can we then be ſurpriſed that there was found a Majority of the Houſe wiſe enough not to be miſled by ſpecious, but falſe Pretences, juſt enough not to paſs the ſevereſt Cenſure on thoſe whom they acquitted of Fault? and, ſufficiently attentive to the Honour and Dignity of Parliament, to diſſent from a Motion *irregular and unprecedented* in *Form, ineffectual and impotent in Operation.* I agree, indeed, ſo far with the Defenders of the Minority, as to diſapprove of the Amendments that were made to the Motion; not however as improper in their Nature, but as treating with too much Tenderneſs a Motion to which in its own Form every diſpaſſionate and thinking Man would have given his Negative.

Theſe

Theſe Amendments, however, have been arraigned; they have been repreſented as a mere Party Trick, propoſed by one of the Majority, to ſerve the Purpoſes of the Leaders of the Majority. If thoſe Purpoſes were ſo, to model the Reſolution as would beſt Anſwer the *avowed* (tho' perhaps not the *ſecret*) Views of thoſe who propoſed it, to form it ſo much on the Caſe of that Warrant it meant to cenſure, that it might appear to apply to that Warrant, and not to be a mere ſpontaneous Reſolution on a general Point of Law, unconnected with any thing that had preceded, they were ſuch as did Honour to thoſe Leaders, as well as to the Gentlemen by whom the Amendments were moved.

But to conſider them on their own Ground: The Word *treaſonable* was added to the Deſcription of the Paper. Why? becauſe ſuch *is* the Nature of that Paper. But ſay the Defences of the Minority, if it was treaſonable it could not be a Libel, for whatever is treaſonable is Treaſon. If I could deſcend to grammatical Quibbling, I would inſiſt that the true Force of the Word *treaſonable* does not carry a Charge of Treaſon, but only a Tendency towards it.

But if there is any Force in the Objection, it would prove the Exiſtence of a treaſonable Libel impoſſible. Yet various Reſolutions of Parliament ſeem to declare their Opinion that a Libel may be *treaſonable*, tho' not amounting to actual Treaſon. On 27th March 1649, reſolved, That a Pamphlet, entitled, *The Second Part of England's new Chains diſcovered*, doth contain much ſcandalous, falſe, and reproachful Matter, is highly ſeditious,

tious, and deſtructive of Government, and tends to Diviſion and Mutiny in the Army, and the raiſing a new war in the Commonwealth: *That the Authors*, &c. *are guilty of Treaſon, and to be proceeded againſt as ſuch.* I do not cite this Reſolution as warranted by the Laws of Treaſon; but to ſhow that the Parliament did then think that a ſeditious Paper *tending* to raiſe Inſurrections would amount even to Treaſon itſelf. On the 7th of Nov. 1654, Colonel *Shapcot* complained to the Houſe of a printed Paper tending to the Scandal of the ſaid Colonel, and to the Diſhonour of Parliament, &c. Reſolved, that the ſaid Paper is *treacherous, falſe, ſcandalous and ſeditious.* On Motion for an Amendment, the word *treacherous* was left out, and *treaſonable* inſerted.

Nay, even in the Year 1689, the happy Æra when Liberty, and of Conſequence the Nature and Difference of Crimes, was beſt underſtood and moſt attended to; *Reſolved to addreſs the King for a Reward for a Diſcovery of the Authors, &c. of a treaſonable and ſcandalous Libel, (omitting too the word Falſe)* entitled "The Hiſtory of the Convention." Ordered, that the ſame be burnt, &c. If on thoſe Authorities I can ſupport the Exiſtence of a Libel treaſonable, though not Treaſon; may I not venture to pronounce the North Briton, No. 45, to be of that Nature? It has been unanimouſly adjudged by both Houſes of Parliament, a falſe, ſcandalous, and ſeditious Libel, tending to raiſe *traiterous Inſurrections, &c.* It is admitted even in the defence of the Minority, that both the *Honour of the Crown, and the Dignity of Parliament, were therein traduced and injured.* It contains a direct Charge of *Falſhood* on his Majeſty's Speech

from the Throne; it asserts that the *Honour of the Crown is sunk even to Prostitution*; it treats an Act of Parliament as an *Intolerable Grievance, and as obtained by Corruption*; it informs the People that they *can legally resist* the Execution of that Act, and incites them so to do. If a Libel then can be treasonable, is this deserving of a more tender Appellation? Is not the mere Advice to resist an Act of Parliament alone sufficient to give it that Quality?

The Propriety of the other Amendment, or rather Addition, I need not so much insist on; its Object was to do Justice to Individuals, admitted to be Innocent, by stating the uniform Course of Office, and the Acquiescence of the Court of King's Bench, to the Legality of those Warrants, on the many Occasions they have been brought before them.

Besides the Reasons above stated against assenting to the Resolution moved, the Pendency of the Case before a Court of Justice was of great Weight. In Answer to that, the Defender of the Minority has taken upon him to assert, that "*the Question of the Legality of the Warrant is not now* sub Judice, *nor ever has been in a Course of legal Determination.*" In Answer to which, I assert with no less Confidence, and I hope more Reason, that *it is now depending*, and, 2dly, *that it was in Pendency in several of the Trials already past.* As to the first, it is the sole and the direct Point in the Action brought by Mr. *Wilkes* against Lord *Halifax*; to this Action Lord *Halifax* has appeared, and when Mr. *Wilkes* thinks proper to reverse the Outlawry, the Action will go on: Nay it is, I am told, the Opinion of his Counsel, and to be argued

argued before the Court, that the Outlawry being only a Plea in Abatement, cannot (to uſe a Law Term) be pleaded after the laſt Continuance; according to which Doctrine, Mr. *Wilkes* may now proceed in the Action. As to the 2d, the Defender has taken great Pains to ſhow that the Legality of the Warrant was not a Point in any of the Bills of Exceptions. Does it follow that it was not before the Court? It was one of the Facts ſtated by Mr. *Wood*, and alſo by the Meſſengers in their Pleas of Juſtification; and if thoſe Pleas had been made good in Evidence, their Sufficiency in point of Law, and of Courſe the Legality of the Warrant, would have been argued and adjudged; nay; it was in the *Power of the Plaintiffs* by demurring to the Plea, inſtead of joining Iſſue upon it, to have brought the Point of Law before the Court, in the firſt Step of the Cauſe. But the Reply has failed his Friend in this Matter: He ſays it has been *declared illegal*; that it has been *decided in Favour of Liberty*. What! *decided*, yet never in Pendency before the Court? *declared illegal* by the *Obiter Dictum* of a ſingle Judge, *without Argument at the Bar on one Side or the other?* Is it poſſible that a wiſe, juſt, independant, and unbiaſſed Judge, could ſo deſcend from the high Dignity, as well as Duty of his Office, as wantonly to throw out an *extrajudicial* Opinion, on a Point not before the Court, and of ſuch Magnitude as deſerved the mature Conſideration of all the Judges of *England*; an Aid which Judges, no way inferior to his Lordſhip, have not on leſs important Occaſions been aſhamed to call in?

I hope theſe Obſervations are ſufficient to convince the impartial Mind of the Propriety of Conduct followed by the Majority, in throwing

out the Motion; they amended it, that, in Caſe it ſhould paſs, it might be in a Form *moſt ſuitable to the Nature of the Caſe, and moſt becoming the Juſtice and Dignity of Parliament.* They rejected it finally, becauſe they thought a Reſolution of the Sort to be *neither conſiſtent with the Principles of the Conſtitution, nor the Uſage of Parliament; and becauſe they knew it would leave the Law at leaſt as indeterminate as before.* They would not conſent to betray the Honour of the Houſe, and the Confidence of their Conſtituents, by impoſing upon them. If a Security to Freedom was neceſſary, they wiſhed to make it effectual, and not to confine themſelves to a mere Reſolution, which, with every amiable Appearance of Public Zeal, would leave the Miſchief in full Force. But the Gentlemen of the Minority, or at leaſt thoſe who were their Leaders in this Matter, wiſhed not for any real Impediment to the future Exerciſe of ſuch Warrants; they would agree only to a Species of Remedy, to

Cheat the deluded People with a Show
Of Liberty, which yet they ne'er muſt taſte of.

They wiſhed to leave the Reins of Government free, for that happy long expected Hour, which ſhould (as their fond Hopes promiſed) bring it into their Hands. They could not bear either that thoſe whom they had repreſented as the plighted Enemies of Freedom, ſhould have the popular as well as real Merit of ſuch a Remedy. They oppoſed the Bill moved by Sir *John Philips.* "*They could not regulate what they did not* "*allow to exiſt.*" Wretched Subterfuge! Did they mean, that a Bill would imply a Doubt that the Law had been hitherto otherwiſe? That, indeed,

deed, would have been fatal to their Views, by the Exculpation of the Miniſter; but if Reaſon and Recollection could, for a Moment, have borrowed the Seat of Paſſion and Diſappointment, they would have found that a Declaratory Bill carries the direct contrary Implication; they would have found that ſome of our moſt ſalutary Statutes have been merely Declaratory. *What was the Bill in Mr.* Hambden's *Caſe but declaratory? What the Bill of Rights? What the Statutes of Weſtminſter? What* Magna Charta *itſelf, but declaratory of the common Law?* Did they mean that a general Warrant can in no Caſe be lawful? I hope I have already proved the Falſity of that Doctrine.

But, ſays the Reply, "If the Majority really "intended a Bill, why did they not carry it "through?" Becauſe, tho' to calm the Alarms of the agitated People, and in reverence to the Opinion of two Hundred and twenty Members, they would have conſented to a parliamentary Regulation of general Warrants, yet, in their own Minds, they ever diſapproved of ſuch a Step. They ſaw no Danger to the Subject from the Uſe of ſuch a Warrant, as to the Arreſt of the Perſon; they knew it to be neceſſary in many Caſes, and to be beyond the Wiſdom of Man to foreſee in what Caſes it might be ſo hereafter; they were aware of the bad Conſequences of binding the Hands of Government too tight. With reſpect to the Seizure of Papers, they thought the Law already clear and certain, as condemning a general Seizure in every Caſe, and allowing ſuch only as is neceſſary to bring a paſt Offence to Puniſhment, or prevent the Execution of any intended Conſpiracy againſt the Peace, or Commerce of the

the Kingdom; they thought, therefore, even a Bill *unneceſſary*, and wiſely feared, that the moſt cautious and well-adviſed Regulation, different from the preſent Law of general Warrants, might be productive of the moſt inconvenient Conſequences to the Peace and Order of Government.

The ſame Reaſons will, I hope, again influence Parliament to leave the Law on the ſame Footing on which the *Revolution left it*, and on which public and private Liberty has ſo long ſtood ſecure; but if they are to declare, or make any Regulation of general Warrants, I truſt they will adhere to the only Mode, either of declaring or enacting Law, that our Conſtitution knows, that Senſe and Prudence can admit, or the Uſage of Parliament authoriſe.

POST-

POSTSCRIPT.

IN the Courſe of the above Conſiderations, I ſtudiouſly avoided every collateral Queſtion; the Letter upon Juries, Libels, *&c.* came therefore but ſeldom in my Way. I am far from meaning, even now, to beſtow much Time or Trouble in a Refutation of the Doctrines contained therein; but beg Leave, in a few Sentences, to ſubmit ſome legal Anſwers to certain Parts of that Work.

The Poſtſcript to the Defence of the Majority has ſufficiently anſwered all that is contained in the Letter, with reſpect to the Origin and Nature of Informations *ex officio*. I hope the foregoing Sheets are ſufficient to ſpare me the Neceſſity of obſerving further upon the Law of general Warrants. The only Points then of my preſent Conſideration are, his Doctrine of Juries, and that of Libels.

I would, in general, obſerve, on all the Reaſoning of that Book, that tho' perhaps many of his Notions and obſervations might be juſt, if the Inquiry was, what ought to be the Law on thoſe Subjects? yet they are totally without Foundation, as applicable to that which the Wiſdom (or, as that Writer would term it, the Folly of our Anceſtors) has tranſmitted to us, and which is, at this Day, the Law of the Land. Indeed his Method of treating each of the Subjects of his Inquiry is ſuch as may, to the moſt curſory Attention, prove the Weakneſs of his Argument; he

he reaſons on general Principles of Expediency and Inconvenience,

Calls Imperfection what he fancies ſuch,

and, from his Notions of thoſe Qualities, deduces his *imaginary* Rules of Law.

With reſpect to the Rights of Juries, he lays it down as a Maxim, that they are Judges of Law as well as Fact. He does not attempt to ſupport this Propoſition by any other Reaſoning, than that of the Inconveniencies which, *he thinks*, might follow, if they had not this Power. I will not anſwer this Method of reaſoning in the Way it authoriſes me to do, by a poſitive Aſſertion, that the Law is otherwiſe, without any Support of Argument.

It is certainly an undoubted Maxim, that the Jury is the ſole Judge of all Matters of Fact: ſo far as to determine on the Fact, it is neceſſary alſo to pronounce on the Law, this laſt, as the neceſſary Attendant on the other, muſt be allowed. The old rule of Law, therefore, *quod ad quæſtionem facti reſpondent juratores, ad quæſtionem juris reſpondent judices*, muſt of Neceſſity contain that Exception: thus, when a Jury finds a Man guilty of Murder, or of a Libel, they pronounce him guilty of that Fact which the Law calls a *Murder*, or a *Libel*. That beyond thoſe Bounds, the Jury have nothing to do with the Law, is a Propoſition almoſt ſelf-evident from the Nature of it, and which has been the conſtant Doctrine of all the Judges and Sages of the Law, from the earlieſt down to the lateſt Times.

Thus

Thus in *Plowden*, 114, the Office of twelve Men is no more than to *inquire of Matters of Fact*, and not to adjudge *what the Law is*, for that is the *Office of the Court, and not of the Jury*. ---So too, at Page 231, *Brown Juſtice* ſays, "it is not the Office of twelve *illiterate* Men to *try Matters of Law*, but only *Matters of Fact*, for that ſo it was ordained *at the Beginning of our Law*."---So too in the Caſe of *Grendon* and the Biſhop of *Lincoln*, 496.---In *Dowman*'s Caſe, 9 *Coke* 13. it is ſaid, "that the common Law has ordained that *Matters of Fact ſhall be tried by Jurors, and Matters of Law by the Judges*; for that it will not compel Jurors *who have not Knowledge in the Law, to take upon them the Judgment of Points of Law*."---So too Page 25.---So in 10 *Coke*, 92. it is ſaid, "the *legal* Part of a Deed belongs *to the Judges*, but the Matters of Fact *to the Country*." So in 11 *Coke*, 10, "Matter of Law is *not triable by the Country*, for the Rule is *quod quiſque norit in hoc ſe exerceat, &c.*" So *Co. Littl.* 155. "the Trial of *Matters of Fact is by the Jury*; but *Matters of Law the Judges ought to decide and diſcuſs*. So *Hawkins*, L. 2. Page 148. Sect. 20. "*Jurors have no more to do with the Law*, "*than Judges with the Fact*." So, Sect. 21. it is ſaid, That Jurors *have nothing to do with, and are preſumed ignorant of the Law*; that the Judge is appointed to *direct them therein, and is preſumed of Ability to do it*. Such then is the Doctrine which has ever been held by the Courts of Law, and the Opinions of Lawyers, with reſpect to the Right of Juries to take upon them the Knowledge of the Law.

Agreeably to this it is that the Oath of the Jurors is, that they will well and truly try, and a *true Verdict* give, *according to the Evidence*; they

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are not not ſworn, therefore, to any thing but what appears in Evidence before them; ſo that whatever is not Matter of Evidence is not within the Oath, and, conſequently, not within the Duty of Jurors. The Writer upon Juries has not thought proper to produce a ſingle Authority, except his own Opinion, in ſupport of his Doctrine. Poſitive Aſſertion is to ſupply the Place of Argument, and the Opinion of that Gentleman is ſet in Oppoſition to the uniform and unvaried Sentiments of the Judges of the Law. But, independent of every legal Argument, to conſider this Matter for a Moment on the Grounds of common Senſe, how is it poſſible, in the Nature of Things, that a ſet of illiterate Men (for ſo they are, in the Eye of Reaſon, as well as of Law) unuſed to legal Ideas, hardly capable of underſtanding thoſe conveyed to them by others, can be fit Judges of the Law?

It has ever been remarked, as the peculiar Wiſdom of the Laws of *England*, that it aſſigns the Trial of every Matter to the Perſons who muſt be preſumed moſt capable to judge of the ſame; but if Juries are Judges of the Law, they are inveſted with the Juriſdiction of what it is impoſſible for them to underſtand.

If a Jury has, in any Matter of Law, not neceſſarily blended with Fact, a Right of Judgment, they have the ſame in every ſuch Matter; ſo that the moſt abſtruſe Points of Law muſt be ſubject to the Conuſance of every low, illiterate Perſon, who happens to poſſeſs the Qualification required by Law.

If then the Principles of common Senſe, and of Law, the uniform Opinion of all Judges and Writers of the Law, and the Form of Oath, can denote

denote the proper Province of a Jury's Conuſance, it is confined to Matters of Fact. I admit indeed the Exception of thoſe Caſes, where, to determine upon the Fact, they muſt neceſſarily pronounce upon the Law. But even there they are not at Liberty to form a Judgment of what is the Law from any Notions of their own. It is the Duty of the Judge to declare to them what is the Law. He is to them *the Voice of the Law itſelf*; in another Point of View, his Directions are the beſt Evidence of the Law they can poſſibly receive; it is their Duty, therefore, to receive the Law *implicitly* from the Judge, and adapting that to the Fact to pronounce accordingly; if they have any Doubt with Reſpect to the Truth of thoſe Directions, they are at Liberty to take the Matter out of the Hands of the Judge, and *by a ſpecial Verdict to carry it for full Argument, and mature Deliberation before the Courts of Law.*

I cannot therefore approve of any Inſtance where the Jury, contrary to the Directions of the Judge in Point of Law (for I think Directions ought to be confined ſolely to Points of Law) pronounces a general Verdict; it is acting contrary to what as to them is the Law, or at leaſt the beſt Evidence of it; it is therefore contrary to their Oath. If it were poſſible in any Caſe to ſuppoſe not only the Judge who tries the Cauſe, but all the Judges of *England*, and even the Houſe of Lords, to be in any Matter of Law corrupt, or under other undue Influence; yet even that would not authoriſe a Jury to aſſume to themſelves a Juriſdiction which the Law does not allow to them, or to pronounce contrary to that Evidence, to which they are bound by their Oath. Much, therefore, as I revere thoſe excellent Qualities of private Virtue, by which the Jury were actuated, in the Caſe of

the ſeven Biſhops, to ſtep forth, in Oppoſition to arbitrary Power, as the Guardians of perſecuted Innocence, yet even there I muſt think they acted *illegally and unconſtitutionally*, by giving a general Verdict on the Law (for the Facts were not diſputed) contrary to the Directions of the Judge. They ought to have given a ſpecial Verdict; and if they had, we may be well aſſured from the Temper of Parliament at that Time, that the Biſhops would have received, *conſtitutionally*, from the Houſe of Lords, the ſame Juſtice, of which the well-meant Zeal of the Jury had aſſumed to themſelves the Diſtribution. I own I cannot conceive the Neceſſity there is, that Juries ſhould aſſume this Power on any Occaſion; a ſingle Judge may be corrupt, but can we ſuppoſe the ſame Corruption to extend to all the Judges of the Land, and the Houſe of Lords alſo, to whom the Matter may finally be brought, to be within the ſame Predicament of Guilt? Let any one review the Reign of *Charles* II. and there ſee the various Ways then made uſe of to obtain wicked and corrupt Juries. Let him, with Horror, behold the fatal Succeſs of thoſe Practices, and the Infamy of thoſe Verdicts to which the Trial by Jury was then proſtituted. If undue Influence is to be preſumed, why are we to preſume the Peers and Judges of the Realm to be under its Direction more than Men of that low and illiterate Rank of Life, from which our common Juries are generally drawn? Are they leſs expoſed to be ſeduced, becauſe their Situation in Life has laid them more open to Temptation? Are their Underſtandings more above the Reach of Practice? Are their Hearts more ſenſible to the Ties of Honour, of Juſtice, and of Truth? If then it is manifeſt, that Juries are never to judge of the Law unleſs where blended with the Fact, that

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even there they are bound to receive the Directions of the Judge as Law, and if they entertain a Doubt of the ſame to return a ſpecial Verdict, the only remaining Point on this Head, is the Diſtinction attempted to be made between Libels and other Offences in this reſpect.

This Diſtinction is the mere Offſpring of Imanation; is it not a Matter of Law as much what conſtitutes a Libel, as what amounts to Murder? I defy the Writer to produce the Shadow either of Argument or Authority in ſupport of this Doctrine. It is ſaid, indeed, that in Political Papers, where the Power of Government always interferes, this Power is neceſſary to the Liberty of the Preſs, as well as of the Subject. If, as I before obſerved, we could ſuppoſe the Peers and Judges of the Realm to be under the Influence of that Power rather than the Jury, that might perhaps be a Reaſon of Expediency; but if we conſider for a Moment, that *wherever the Court is one Party, the People are the other*, and that the Jury is taken from the latter, we ſhall find as much Reaſon to doubt of the undue Influence of popular Poſſions on their Verdict, as of the Power of Government over the Courts of Law, and the upper Houſe of Parliament.

With regard to Libels, the Writer aſſerts, that the *Falſehood* is of the *Eſſence of the Offence*, and muſt therefore *be proved*. Here he has indeed confirmed his Doctrine by the Authorities of Lawyers. Of what Nature are they? The Arguments of Counſel at the Bar; a *Saying ſaid* to have been *always ſaid* by a Judge, and a Paſſage from *Hawle*'s Treatiſe on the Duty of petty Juries, reſpecting a Caſe, *which by Hypotheſis is no Crime in Fact or Law*, though worked up by ſpecial

cial Aggravation in the Indictment or Information, where that Author very properly ſays, "the "Jury ought to find not Guilty; as alſo where it "appears that there was no Falſhood, Scandal, or "Malice in the Fact." I will freely admit, that where all thoſe Qualities are away, there can be no Libel; but I abſolutely deny that that Authority requires each as eſſential to the Crime; and if it did, I would with the ſame Aſſertion deny it to be Law. In *Coke* 5. 125. it was reſolved by the Court, that *it is not material whether the Libel is true or falſe*, or whether the Party libelled *be of all good or ill fame*; for the Party grieved *ſhould complain of any Injury done him in a regular Courſe of Law*, and not revenge himſelf by the odious Courſe of *Libelling or otherwiſe*. So in *Hobart* 253. *A Libel is not to be juſtified, though the Contents be true*, unleſs in Action on the *Caſe*. According to Lord Chief Juſtice *Holt*, ſcandalous Matter is not neceſſary to make a Libel; and it is enough if the Defendant induces an ill Opinion to be had of the Plaintiff, 3d *Salkeld* 226. In *Hawkins*'s Pleas of the Crown, Book 1. c. 73. 6. the *Truth is no Juſtification of a Libel*, becauſe if true it is the more provoking; and no Man is to be Judge of his own Injury, Sect. 8. Upon the Strength of thoſe Authorities, and the uniform Doctrine of the Court of King's Bench in all Indictments for Libels, may I preſume to diſpute the Opinion of the Letter, and to contend that there is no Rule of Law more certain than that a Libel cannot be juſtified in an Indictment by the Truth?

The Reaſon of the Law is moſt wiſe in this reſpect, as well as of the contrary Doctrine in Actions on the Caſe. Libels, whether true or falſe

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in Fact, muſt in the Eye of the Law *of Neceſſity be falſe*, becauſe the Law regards every one as innocent until judicially convicted of ſome Crime. It holds him undeſerving of the Reproaches on his Character contained in the Libel; and of Neceſſity therefore conſiders the Libel as *falſe*. In this Point of View, the falſehood may be ſaid to be eſſential to the Offence, becauſe every Libel in Law is falſe; but as neceſſary to be proved, it is certainly not ſo. Indeed the Matter of Libels conſiſting for the moſt Part in general Reflections upon Character, is of ſuch a Nature as to be incapable of being proved. But even where they can be proved, will the Law ſuffer a Perſon not arraigned of any Crime to be brought to Trial perhaps for his Life, in Juſtification of a Libel charging him therewith, ſo that inſtead of receiving Redreſs for the Injury already received, he is himſelf to ſtand in the Light of the accuſed, and to defend himſelf as ſuch? But though the Perſon ſhould be really Guilty, yet at the Time of Publiſhing the Libel, he was in the Eye of the Law an innocent Man, and ſtands therefore with regard to the Libel, in the ſame Situation as if really guiltleſs of the Crime. The *Reputation and good Character* of a Subject is no leſs under the Protection of the Law, than his Life, Liberty, or Property. It is indeed the moſt valuable Right, the Loſs of which,

------*makes him poor indeed*---

and where, for any Injury received, he is no leſs intitled to the Juſtice of his Country againſt the Offender than for any other Crime*. But in Actions

* The general Principle on which Libels have by many Judges and Writers been held Criminal, is it Tendency to a Breach

Actions where the Party comes not for Puniſhment of the public Offence, but Satisfaction of the private Injury, the Law will not conſider a Perſon really guilty of the Charge imputed to him, and indecent enough to demand Reparation for the Imputation of what he was not aſhamed to commit, as a proper Object of ſuch Satisfaction; and therefore admits Evidence of the Truth.

Having thus obſerved on the Doctrine of our Author on the two Points propoſed, I will now take Leave of him. He ſhall enjoy unmoleſted his ideal Diſtinction of *actual* and *conſtructive* Crimes; he ſhall be at Liberty to ſuppoſe that there may be a *Crime* where is *no actual Crime*; and that tho' a Libel is an *Injury in the moſt valuable Right we can poſſeſs*, and in the Indictment ſaid to be *contra pacem Domini Regis*, yet that it is not what the Law calls a Breach of the Peace.

After all, I will do Juſtice to the Judgment and Underſtanding of that Gentleman; whatever others may be, I am perſuaded he is not the Dupe of his own Deceit; and does not, I am ſure, expect to gain the Aſſent of any one verſant in the Law to his Doctrine, but has fully attained the End of his Labours, if *falſe Principles, partial Quotations, hearſay Authorities, and fallacious Arguments*, can miſlead the Multitude of thoſe

Quos mala ſtultitia et quoſcunque inſcitia veri
Cæcos agit.

Breach of the Peace; whereas independent of its Tendency, the Act itſelf carries a preſent Injury to the Peace of another, and therefore to the Peace of the State. This Principle ſeems at firſt to have taken Place with a View to bring Libels within the Juriſdiction of the Star Chamber.

FINIS.